

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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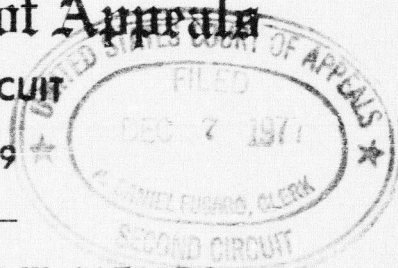
77-6109

To be argued by
LEE A. ADLERSTEIN

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6109



ANTHONY B. CATALDO and ADA W. CATALDO,
Appellants,

—against—

DAVID P. LAND, T. GORMAN REILLY and
ROBERT LEVINE,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Docket No. 77-6109

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Appellants,
—against—

DAVID P. LAND, T. GORMAN REILLY and
ROBERT LEVINE,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

Preliminary Statement

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*), entered on June 22, 1977, dismissing appellants' complaint (seeking damages from three government officials for alleged wrongdoing during the course of a tax refund trial) on the grounds that the issues presented therein had been previously and conclusively litigated. The opinion below has not been officially reported. A copy of that opinion appears in appellants' appendix at 82.

Anthony and Ada Cataldo commenced the instant action on or about November 27, 1974 in the Supreme Court of the State of New York, County of Queens, seeking judgment against David P. Land and T. Gorman Reilly, then both Assistant United States Attorneys for the Southern District of New York,¹ and against Robert Levine, an agent of the Internal Revenue Service ("IRS"), for alleged wrongdoing committed during the trial, in May 1973, of a tax refund suit brought by the Cataldos in the United States District Court for the Southern District of New York. The instant action was removed to the United States District Court for the Eastern District of New York on December 16, 1974.²

Appellant Anthony Cataldo appeared *pro se* in the tax refund suit, which was for the sum of \$2,718.49. It took three days to try and the proceedings consume four pages of docket entries.

Appellees Land and Reilly, as Assistant United States Attorneys for the Southern District of New York, conducted the Government's defense of the refund suit. Appellee Levine was the Revenue Agent responsible for the audit of Mr. Cataldo's tax records, and he testified on behalf of the Government at the trial.

¹ Land and Reilly have since resigned as Assistant United States Attorneys.

² Removal was effected pursuant to 28 U.S.C. § 1442. Land, Reilly, and Levine filed an answer to the Cataldos' complaint on March 26, 1975, wherein they asserted, among other things, that all acts of the appellees in connection with the litigation of the tax refund suit were performed in their respective official capacities, were acts within the scope and jurisdiction of their respective offices, and were done in the execution in good faith of their professional duties. Mr. and Mrs. Cataldo then moved to strike the appearance of the United States Attorney for the Eastern District of New York and the answer filed by him on behalf of Land, Reilly, and Levine. The district court denied the motion in a memorandum of decision and order dated July 1, 1975.

In the district court, the Cataldos alleged (1) that Agent Levine committed perjury during the tax refund trial and wrongfully disregarded a subpoena *duces tecum*; and (2) that Assistant United States Attorneys Land and Reilly suborned Levine's perjury, misrepresented the applicable law and operative facts to the court, and, in concert with Levine, wrongfully disregarded the subpoena *duces tecum*. Mr. and Mrs. Cataldo contended that this wrongdoing constituted fraud on the court and obstruction of justice and resulted in the dismissal of their tax refund suit. They sued for actual damages of \$10,000 plus punitive damages in the aggregate amount of \$90,000.

Land, Reilly, and Levine moved in the district court for an order pursuant to Rule 12(c) of the Federal Rules of Civil Procedure granting judgment on the pleadings dismissing the action for failure to state a claim upon which relief could be granted or, *in the alternative*, for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure granting summary judgment dismissing the action because there was no genuine issue as to any material fact and because they were entitled to judgment as a matter of law.

Appellees' motion was granted by the court on June 22, 1977 and this appeal followed.

Statement of Facts

A. Appellants' allegations

The allegations set forth in appellants' complaint all relate to actions taken by Land, Reilly, and Levine during the course of the two and one half day trial of the Cataldos' tax refund suit in May 1973. The trial was held before the Honorable Richard H. Levet, United

States District Judge, in the United States District Court for the Southern District of New York. The court issued its decision on June 29, 1973, granting judgment to the United States and dismissing the complaint with prejudice. The judgment issued on July 13, 1973 and was appealed to this Court, which affirmed Judge Levet's decision in a *per curiam* opinion dated June 25, 1974. *Cataldo v. United States*, 501 F.2d 396 (2d Cir. 1974).

Since the allegations raised in the instant action were first put in issue by Mr. and Mrs. Cataldo in the prior tax refund litigation, certified copies (except for appellate briefs and opinion) of various documents relating to the first proceeding have been filed with this Court and copies of such documents have been included in appellees' appendix.³ The specific acts of alleged wrongdoing are hereinafter summarized with appropriate reference to the appendix to explain the factual context.

1. Allegations of misrepresentation of applicable law and operative facts

The allegation by the Cataldos that appellees Land and Reilly misrepresented the applicable law and operative facts (Complaint ¶¶ 8 and 9) primarily relates to certain petty cash deductions which the Internal Revenue Service had initially allowed in a notice of deficiency but which the Government later contested in appellants' tax refund action.⁴ As attorneys for the United States, Land

³ References preceded by the letter "A" are to pages of appellees' appendix; those preceded by "Br." are to pages of appellants' brief.

⁴ The Government also challenged the treatment of certain cash contributions and interest expenses, contending that they should be itemized deductions rather than business expenses. (A. 330, 338).

and Reilly had argued that in a tax refund suit the Government could contest deductions which it had earlier allowed and that the burden of proof with respect to these additionally contested items was on the taxpayer. Mr. and Mrs. Cataldo argued strenuously in the trial court (A. 322, 324, 334, 346, 352, 357, 408, 418) and again in the appeals court (A. 480) that the Government bore the burden of proof with respect to additionally contested items. However, as the Government pointed out to the trial judge (A. 190, 238, 320),⁵ this rule prevails in petitions to the Tax Court, *not* in refund actions. The Government's position was adopted by Judge Levet (A. 465) and was affirmed by this Court (A. 578).⁶

The charges respecting the so called misrepresentation of facts also apparently relate to the deductions which were in issue at trial. In the trial court, the Cataldos challenged the right of the Government to contest the deductibility and treatment of certain expenditures which had been previously allowed by the IRS (A. 322, 324, 334, 346, 352, 357). On appeal they now characterize the exercise of this right by the Government as a misrepresentation of the facts. Mr. Cataldo repeatedly

⁵ The Government also submitted a memorandum of law to the trial court (See A. 580).

⁶ Cataldo repeats, in his brief to this Court, the charge that the trial judge chose to follow, for the purpose of order of proof at trial, a list of items compiled by the Government which included expenses that the Government had originally allowed. Mr. and Mrs. Cataldo contest the decision of the court not to concentrate instead on a list of items prepared by them, which was not as extensive as that of the Government. (Br. at 4-5). It is clear that the court's decision in this regard was ancillary to its determination that the Government could challenge, at trial, items that were originally allowed. Accordingly, the allegation of fraud and collusion between the Government and trial judge on the issue of the order of proof has no basis in logic, and we submit further that such claims are based on mere conjecture.

accused appellee Reilly of making untrue statements (A. 135, 181, 388), but he was properly rebuked by the trial judge for this unfounded criticism (A. 135, 18).

2. Allegations of perjury and subornation of perjury

The allegations that appellee Levine committed perjury (Complaint ¶ 7, 17) and that appellees Land and Reilly suborned this perjury (complaint ¶ 18, 19) relate to testimony given by Agent Levine in connection with the Cataldos' attempts to substantiate \$2,230.23 in petty cash disbursements. In the trial court, Mr. and Mrs. Cataldo claimed that they were unable to substantiate these disbursements because at some time prior to trial, Anthony Cataldo's office diary (which appellants presume would satisfy their burden of proof) was "lost" (A. 52, 265). The Cataldos maintained that Agent Levine had personally seen and reviewed this diary in preparing his initial recommendation that all items under \$25 should be allowed (A. 310). However, Levine testified that he did not recall seeing this diary (A. 273, 281) and that he made his recommendations on the basis of some "yellow cap paper" furnished by the Cataldos which was marked "Diary" (A. 285, 287, 294). Mr. and Mrs. Cataldo then sought to introduce secondary evidence in place of the diary in the form of (a) Anthony Cataldo's testimony that he made his office diary available to the IRS during the audit period and (b) the supposed testimony of Revenue Agent Levine in a deposition that he had reviewed an office diary in making his reports. The trial court admitted Anthony Cataldo's testimony but excluded as irrelevant the testimony of Agent Levine (A. 297-298).

⁷ It should be noted that Anthony Cataldo refused to produce his "office diary" in response to the Government's discovery request prior to trial (A. 309, 313, 317).

The conclusory allegation of subornation of perjury is not supported by any factual pleadings. Presumably it is based on the Cataldos' assumption that Assistant United States Attorneys Land and Reilly conferred with Agent Levine prior to Levine's testifying that he did not recall seeing a diary and that his recommendations were based on the "yellow cap paper" marked "diary".

3. Allegations of wrongfully disregarding a subpoena *duces tecum*

The allegations that Land, Reilly, and Levine wrongfully failed to respond to a subpoena *duces tecum* (Complaint ¶ 17, 19) apparently relate to a subpoena which the Cataldos served upon Revenue Agent Levine demanding that he produce at trial all records and memoranda of the IRS relating to the audit of appellants for the year 1963. These records were not produced on the grounds that they were irrelevant or were privileged confidential interdepartmental memoranda (A. 289, 292). The trial court upheld the Government's refusal to furnish these records (A. 289, 292).

B. The district court's decision

On June 22, 1977, following the filing by Land, Reilly, and Levine of a motion to dismiss the complaint, and following the filing of a cross-motion by the Cataldos for summary judgment, the district court, per Mishler, J., dismissed the complaint. The court, declaring that "[the] action is styled as one for damages against individual government officials, [but] is in reality a collateral attack on the judgment rendered in the prior refund suit," found that "[b]oth the rule against collateral attack of a valid judgment and the doctrine of collateral estoppel bar maintenance of this suit." All the contentions that were made in the instant action were found by Judge Mishler to have been actually presented to Judge Levet,

and to this Court, in the Cataldos' tax refund action. Such a fact, Judge Mishler reasoned, bars relitigation of the same issues.

ARGUMENT

POINT I

This court should follow the reasoning of the district court and should affirm that court's decision.

Cataldo and his wife argue that the decision of the district court should be reversed, that this Court should grant partial summary judgment in their favor pursuant to New York law, and that a joint trial on the "conspiracy count" against the three appellees should be ordered. In support of their position, they advance the well-established proposition that a suit alleging that a court judgment was influenced by extrinsic fraud has a legal basis independent of the suit in which the fraud was perpetrated. *Griffith v. Bank of New York*, 147 F.2d 899, 903 (2d Cir.), *cert. denied*, 325 U.S. 874 (1945); N.Y. Jud. Law § 487 (McKinney 1968).⁸

However, appellants' brief fails to recognize the weight of the equally well-established proposition that an attack upon a judgment is barred when the very allegations presented in such an attack were argued to, and

⁸ That section provides, in relevant part:

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . .

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

were decided by the court in the suit in connection with which fraud is alleged. This principle of judicial finality has given rise to two rules, each of which operates to bar the instant action: (a) the rule against collateral attack on a valid judgment in a separate proceeding and (b) the doctrine that a party is estopped from collaterally relitigating issues judicially determined in a prior action.

A. Rule against collateral attack

Although the instant action is styled as one for damages against individual defendants, it is in reality a collateral attack on the valid, competently reached judgment rendered in favor of the United States in the prior tax refund suit. Indeed, the gravamen of the Cataldos' complaint is that the district court would not have found against them *but for* the alleged wrongdoing of the appellees (Complaint ¶ 20).

The Federal Rules of Civil Procedure provide several ways of directly attacking a judgment which is the product of the kind of "fraudulent" conduct alleged in the complaint. Rule 50(b) allows a party to move for relief from a judgment which results from fraud, misrepresentation or other misconduct of an adverse party. Rule 52(b) allows a party to move for amendment of the court's findings or for additional findings. Rule 59(a) allows a party to move for a new trial. Finally, a party can directly attack a judgment by appealing therefrom.

Cataldo and his wife made post-trial offers of proof to the trial court in their tax refund action in which they raised, without success, the same allegations of wrongdoing which underlie the instant action. See discussion on pp. 4-7, *infra*. They also raised the very same contentions on appeal. *Id.* However, there is no indication in the docket sheet (A. 579) that the Cataldos utilized any of the other procedures designed to purge the effect on a judgment of fraudulent conduct.

Rather, it is plain that having been unsuccessful in trying to convince the trial court and appellate court that there was any merit to their charges, Mr. and Mrs. Cataldo are now attempting to avoid, defeat and otherwise evade the judgment of the court in the tax refund action by commencing this civil suit against the individuals who allegedly committed the "fraud." However, even assuming the truth of their allegations, it is an adjunct of the doctrine of judicial finality that alleged fraudulent conduct which is *intrinsic* to a prior judicial proceeding and which results in an adverse judgment will not support an independent action collaterally attacking that judgment.⁹ *United States v. Throckmorton*, 98 U.S. 61 (1878). *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir.), *cert. denied*, 409 U.S. 883, *rehearing denied*, 409 U.S. 1029 (1972). It is beyond peradventure that the wrongdoing alleged by the Cataldos was wholly intrinsic to the tax refund proceedings.

Moreover, although the extrinsic-intrinsic distinction drawn in *Throckmorton* was obfuscated somewhat by the Supreme Court's decision in *Marshall v. Holmes*, 141 U.S. 589 (1891), this Court noted, in *Serzysko v. Chase Manhattan Bank*, *supra*, that even assuming that the extrinsic-intrinsic distinction was no longer viable, the test suggested by *Marshall* was a related one, namely "whether there was an opportunity to have the grounds now relied upon to set aside the judgment fully litigated in the original action." 461 F.2d at 702 n.2. In this regard, it cannot reasonably be disputed that appellants not only *had* the opportunity fully to litigate the issues raised here, but in fact fully exercised this opportunity. They were, quite simply, the losers.

⁹ A concomitant doctrine is that this same wrongdoing will not support a private cause of action for damages against the alleged wrongdoers. *Griffith v. Bank of New York*, *supra*. This is the source of the rule, discussed in Point II(C) *infra*, that there is no cause of action for perjury or subornation of perjury.

B. Collateral estoppel

Since the issue of appellees' alleged misconduct was actually raised both in the trial court and in this Court in the prior tax refund action, Mr. and Mrs. Cataldo are also precluded by the doctrine of collateral estoppel from relitigating these issues in a second suit.

The doctrine of collateral estoppel, as traditionally defined, provides that in a second litigation between the same parties or their privies involving a different cause of action, the judgment in the first suit operates as a collateral estoppel as to those matters or points which were in issue or controverted in the first action and upon the determination of which the judgment in the first action necessarily depended. *Cromwell v. County of Sac*, 94 U.S. 351 (1876); *Irving National Bank v. Law*, 10 F.2d 721 (2d Cir. 1926). See generally 1B J. Moore, *Federal Practice* § 0.441(2) at 377 (2d ed. 1974). Under the test now applied in this and most other circuits, and, as the district court below found, three factors are required to support a defense of collateral estoppel: (1) the issue sought to be raised in the second action must have been in issue and judicially determined in the prior action; (2) the determination in the first action adjudicating the matter in issue must have been a "final" decision; and (3) the party against whom the defense of collateral estoppel is asserted must have been a party or in privity with a party to the first action.¹⁰ *Kraeger v. General Electric Co.*, 497 F.2d 468, 471-472

¹⁰ The Second Circuit has expressly abandoned the traditional requirement of mutuality, i.e., that the person invoking the conclusional effect of the first judgment must have been either a party or in privity with a party to the suit in which the first judgment was rendered. *Zdanok v. Glidden Co.*, 327 F.2d 944, 956 (2d Cir. 1964). See also *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324, (1971).

(2d Cir.), *cert. denied*, 419 U.S. 861, *reh. denied*, 419 U.S. 1041 (1974). A review of the allegations and points raised in the Cataldos' prior tax refund suit and the disposition of that action leads ineluctably to the conclusion that the doctrine of collateral estoppel is appropriately invoked here.

The first factor required to establish a collateral estoppel defense—identity of issues—is clearly present. Each of the allegations raised in this suit was in "issue" in the prior action, either before the district court or the court of appeals. Indeed, throughout the course of the trial Cataldo and his wife repeatedly contended that appellees Reilly and Land were misrepresenting the applicable law and the operative facts and that they had wrongfully failed to observe a subpoena *duces tecum*. The trial court dealt with and disposed of each of these objections, even giving the Cataldos an opportunity to argue such objections by submitting papers in support of a post-trial motion to amend the complaint and to reopen the trial.¹¹

¹¹ In a memorandum in support of this post-trial motion (A. 407), Mr. and Mrs. Cataldo argued that the burden of proof was unreasonably on them with respect to additional disallowances claimed by the Government (A. 417-20); that they should have been permitted to read into the record a portion of Revenue Agent Levine's deposition testimony (A. 420-21) (which appellants claim substantiates their claim of perjury); and that Assistant United States Attorneys Land and Reilly resisted the subpoena *duces tecum* on improper grounds (A. 413-15). The trial court responded to the Cataldos' motion with a memorandum decision dealing with these allegations, notwithstanding its belief that they were "nothing more than a recital of arguments which have already been made on the record" (A. 425, 426, 427, 429). Judge Levet concluded that the Cataldos had failed, in their motion and in a subsequent offer of proof (A. 431), to demonstrate any reasons for the court to amend the complaint and reopen the trial (A. 429). Finally, the trial court, in its "opinion, Findings of Fact and Conclusion of Law", ruled again on the deductions properly in issue and the applicable burden of proof (A. 478).

With respect to the allegations of perjury and subornation of perjury, one need only note that the trial court listened to the testimony of Agent Levine and observed the conduct of appellees Reilly and Land in eliciting such testimony. Appellant Anthony Cataldo testified on his own behalf and was permitted to cross-examine Levine. The court then weighed the testimony and made appropriate findings of fact. Moreover, it is clear from the charges contained in the complaint that Mr. and Mrs. Cataldo were in possession at the time of the trial of all the information which they now contend supports their allegations of perjury and subornation of perjury. They therefore had an opportunity at the trial to discredit the testimony of Agent Levine with respect to all matters which the trial judge deemed relevant, and the court correctly decided that there was "no merit in allowing further proof on this issue" (A. 429).

Mr. and Mrs. Cataldo then appealed Judge Levet's decision to this Court, and their 64 page brief specifically focused on the claims that underlie this action, to wit, Agent Levine's alleged perjury and the supposed misconduct of Assistant United States Attorneys Land and Reilly in allegedly suborning his perjury (A. 509-11, 542), refusing to respond to the subpoena *duces tecum*, and misrepresenting the applicable law (A. 493-99, 542). The Cataldos contended that these actions deprived them of a fair trial, and this Court, in its *per curiam* opinion affirming the trial court's decision, *Cataldo v. United States*, 501 F.2d 396 (1974), considered, and rejected, these allegations:

We have carefully considered the record and the transcripts of that trial and the briefs submitted to us by the parties and have concluded that appellants were afforded a fair trial and that the District Court did not err in finding for the Government. We therefore affirm. 501 F.2d at 396.

Clearly, the decision of this Court that Cataldo and his wife were afforded a fair trial and that the trial court did not err in its decision in favor of the Government necessarily depended on a determination that there was no merit to any of appellants' contentions. Having had every opportunity to present to this Court whatever evidence they may have had to support their charges of misconduct, the Cataldos should now be estopped from maintaining a new lawsuit on the very matters that have been judicially determined.¹² See *Wolcott v. Hutchins*, 245 F. Supp. 578, 581 (S.D.N.Y. 1965), *aff'd per curiam*, 365 F.2d 833 (2d Cir. 1966); *Rosenberg v. Martin*, 478 F.2d 520, 525 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973).

The second factor required to establish a collateral estoppel defense—a final judgment adjudicating the issue—is also clearly present. This point needs no belaboring;

¹² The fact that the allegations herein were not the focal point of the prior proceedings does not obviate the operation of collateral estoppel. To be precluded by a prior judgment's collateral estoppel effect, an issue need only be "a single certain and material point arising out of the allegations and contentions of the parties." *Paine & Williams Co. v. Baldwin Rubber Co.*, 113 F.2d 840, 843 (6th Cir. 1940). Indeed, in discovering what issues were determined by the judgment in a prior proceeding, the court in the second action is free to go beyond the judgment and may examine the pleadings and evidence in the prior action. *The Evergreens v. Nunan*, 141 F.2d 927, 928 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). In this regard, the trial and appellate courts in the prior proceeding focused on the very allegations which underlie this action.

The fact that an appellate court also made an independent judicial determination that there was no merit to allegations of perjury, subornation of perjury, wrongful failure to respond to a subpoena and misrepresentation of the applicable law simply underscores the appropriateness of applying collateral estoppel to this case. An appellate court's judgment is entitled to *res judicata* and collateral estoppel effect when it becomes final to the same extent as any other judgment. *Angel v. Bullington*, 330 U.S. 183 (1947); *American Surety Co. v. Baldwin*, 287 U.S. 156, 165-67 (1932).

judgment on the merits from which no further appeal may be taken is the paramount "final" judgment. *Clegg v. United States*, 112 F.2d 886 (10th Cir. 1940); 1B J. Moore, *Federal Practice* ¶ 0.409[i] at 1001-1012 (2d ed. 1974). The trial judge duly considered the Cataldos' allegations in disposing of the prior refund action on its merits, and this Court further considered these contentions in affirming such disposition. Since Mr. and Mrs. Cataldo did not attempt to further appeal the decision of the Second Circuit, that court's decision is clearly a "final" decision adjudicating the matters in issue within the most stringent meaning of this requirement.

Likewise, the third factor needed to support a collateral estoppel defense—that the person against whom the prior judgment is asserted must have been a party to the earlier proceeding or in privity with a party—is indisputably present. This Court need only note that appellants herein were also the plaintiffs in the tax refund action. They were clearly afforded, and availed themselves of, the opportunity to litigate the issues now raised. The appendix submitted in support of this brief underscores the fact that appellant Anthony Cataldo, acting *pro se*, pursued the tax refund suit with indefatigable zeal. It is thus beyond question that Mr. and Mrs. Cataldo had their day in court on the issues raised in this suit.

The rule against collateral attack on a judgment and the doctrine of collateral estoppel were designed to preclude the maintenance of claims precisely like those advanced on this appeal. It is difficult to envision a situation where the doctrine of collateral estoppel would better serve its function as a "reasonable measure calculated to save individuals and courts from the waste and burden of relitigating old issues." *Tillman v. National City Bank*, 118 F.2d 631, 634 (2d Cir.), *cert. denied*, 314 U.S. 650 (1941).

POINT II

The district court's order is entitled to affirmance on various alternate grounds.

Even assuming, *arguendo*, that the Cataldos' suit against Land, Reilly, and Levine is not barred by the rule against collateral estoppel, the record makes plain that the instant action is proscribed by various other doctrines of law. This Court certainly has the power to affirm the judgment of the district court, even if the court relied upon a wrong ground or gave an incorrect reason for its decision. *Lum Wan v. Espardy*, 321 F.2d 123 (2d Cir. 1963). We hereinafter set forth the arguments that give additional support to Judge Mishler's order.

A. Quasi-judicial immunity

The federal doctrine¹³ of quasi-judicial or "prosecutorial" immunity provides, in brief, that federal prosecutors possess an absolute immunity from civil damage suits for acts taken in the course of discharging their official duties. See *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).¹⁴ Quasi-judicial

¹³ It should be noted at the outset that federal law is applied in determining the validity of a defense to a cause of action against federal officers for action allegedly taken under "color", although in violation of, their official duties. *Howard v. Lyons*, 360 U.S. 593, 597 (1959); *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947); cf. *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963). Thus, federal law is determinative in applying the defense of quasi-judicial immunity.

¹⁴ *Imbler* involved an action against a state prosecutor under 42 U.S.C. §1983. The holding in *Imbler* was applied to federal prosecutors by this Circuit in *Brawer v. Horowitz*, 535 F.2d 830 (2d Cir. 1976).

immunity is an outgrowth of the common law doctrine of absolute immunity of judges for "acts committed within their judicial jurisdiction", even if the acts are malicious or corrupt and therefore in excess of their jurisdiction, *Bradley v. Fisher*, 80 U.S. 335 (1871) and is rooted in the same policy considerations, namely that government attorneys, like judges, should be free to exercise the duties of their offices without the threat of vexatious lawsuits. *Imbler v. Pachtman*, *supra*; *Yaselli v. Goff*, *supra*. Furthermore, the determination that the quasi-judicial officer was doing those acts which fall within the scope of his duties activates the immunity and precludes any inquiry into the purpose behind the act. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

Among the many reasons given by the Supreme Court for reaffirming the doctrine of absolute quasi-judicial immunity in *Imbler v. Pachtman*, *supra*, were (1) the government attorney must be free to exercise his judgment as to the choice of witnesses and the conduct of trials without being constrained in making every decision by the consequences in terms of his own liability in a suit for damages, 424 U.S. at 423, and (2) the judicial system itself affords redress to the wronged party through post-trial relief and the government attorney himself may be subject to criminal and disciplinary action for misconduct which may not be the subject of a civil action. 424 U.S. at 427.

Absolute quasi-judicial immunity has also been applied since *Imbler* to bar civil damage suits against Assistant United States Attorneys for actions taken within the scope of their quasi-judicial activities in representing the United States in civil actions.¹⁵ The Ninth Circuit recently

¹⁵ The reasons for extending the quasi-judicial immunity to government attorneys representing the United States in civil proceedings are just as compelling as they are with respect to

[Footnote continued on following page]

held in a case similar to that at bar that the doctrine, as defined in *Imbler*, protects Assistant United States Attorneys who represent the Government in an IRS tax deficiency action. *Flood v. Harrington*, 532 F.2d 1248 (9th Cir. 1976). The court stated:

Nor do we see any significant reason to distinguish actions involving civil claims from those involving underlying criminal prosecution. The reasons supporting the doctrine of absolute immunity, *Imbler* [citation omitted] apply with equal force regardless of the nature of the underlying action. 532 F.2d at 1251.

The court held that the doctrine of absolute judicial immunity protects the government attorneys "if their allegedly improper conduct was 'intimately associated with the judicial phases' of [the plaintiff's] tax litigation". 532 F.2d at 1251. *Flood* is fully supported by a body of case law holding that United States Attorneys who represent

federal prosecutors. The United States Attorney is required by law to "prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned". 28 U.S.C. §542(2). He and his assistants are expected to commence and defend large numbers of civil actions on behalf of the Government. In order effectively to discharge their duties, they must be free to call witnesses of their own choosing, conduct trials, argue and otherwise present the Government's case without fear that private litigants will subsequently commence damage actions against the government attorneys themselves. To hold otherwise would subject government attorneys in civil actions to the inhibiting threat that prompted the Supreme Court to reaffirm the immunity in *Imbler*, i.e., the attorneys will be inhibited from prosecuting or defending the Government's case with vigor for fear of exposure to civil liability; a substantial amount of the government attorney's valuable time will be spent defending himself instead of discharging his appointed duties; and post-trial forms of relief usually employed to rectify the wrongdoing underlying the civil damage action will be confused and perhaps rendered useless.

government employees in civil litigation are protected from private damage actions by the quasi-judicial privilege usually accorded to prosecutors. See, e.g., *Rudnicki v. Cox*, 372 U.S. 226 (1963); *Skolnick v. Hanrahan*, 398 F.2d 27 (1968); see also *Boruski v. Stewart*, 381 F. Supp. 529 (S.D.N.Y.), *aff'd*, 493 F.2d 301 (2d Cir. 1974); cf. *Franklin v. Zuber*, 56 F.R.D. 601 (S.D.N.Y. 1972).

It is clear that the absolute quasi-judicial immunity applied in *Imbler* and *Flood* similarly operates to bar the instant action against Assistant United States Attorneys Land and Reilly. They are accused of "wrongdoing" incident to those acts which are an integral part of a government attorney's official duties in a judicial proceeding, i.e., conferring in court with a witness, asking the witness questions on the stand, offering legal arguments to the court, and objecting to discovery requests. Thus it cannot reasonably be disputed that the injury to the Cataldos arose, if at all, out of conduct of Land and Reilly which was "intimately associated with the judicial phases" of the tax litigation. This threshold determination invokes absolute quasi-judicial immunity and precludes further inquiry into the motivation or ill intent which Mr. and Mrs. Cataldo contend, by their conclusory allegations of "subornation of perjury" and "misrepresentation" of law, underlies the action taken by the appellees at trial.

¹⁶ New York cases cited by appellant, i.e., *Lyons v. Goldstein*, 290 N.Y. 19, 47 N.E. 425 (1943); *Morhous v. Supreme Court of the State of New York*, 293 N.Y. 131, 56 N.E. 79 (1944); *People v. Savvides* 1 N.Y. 2d 554 (1956); and *People v. Schwartzman*, 24 N.Y.2d 241 (1969), do not stand for the proposition that a public attorney who wins his case through deceitful conduct is liable to the losing party in damages for depriving that party of his "constitutional rights". Indeed, they stand for precisely the opposite proposition, namely that wrongdoing committed in a judicial proceeding is to be redressed within that proceeding, either by motion to vacate the judgment and for a new trial or by appeal to a

[Footnote continued on following page]

B. Qualified official immunity

The Supreme Court has held, in two cases involving state executive officers, that employees of the executive branch of government are entitled to a "good faith, reasonable grounds immunity" for actions taken in the course of their official duties. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308, *reh. denied*, 421 U.S. 921 (1975). "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer v. Rhodes*, *supra*, 416 U.S. at 250. Such immunity protects state officers and employees from suits based on "good faith, non malicious action taken to fulfill their official duties", and is necessary so that public officers understand that "action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under the circumstances will not be punished". *Wood v. Strickland*, *supra*, 420 U.S. at 321.

In the recent case of *Economou v. United States Department of Agriculture et al.*, 535 F.2d 688 (2d Cir. 1976), *cert. granted*, 51 L. Ed. 2d 534 (1977), *argued*, November 7, 1977, this Court found that the "good faith, reasonable grounds" immunity articulated in *Scheuer* and *Wood* is likewise applicable to federal officers and

higher court. See the discussion of this point in *Morhous v. Supreme Court of State of New York*, *supra*, at 140.

In other cases cited by the Cataldos the government attorneys were not engaged in activities which constituted "an integral part of the judicial process". Rather, they were acting as investigators and police officers. *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955); *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir.), *cert. denied*, 409 U.S. 1029 (1972).

employees.¹⁷ Although neither the Supreme Court nor the Second Circuit has attempted to define the class of executive officers who are entitled to qualified official immunity, this Court previously extended the doctrine of absolute official immunity (the predecessor to qualified immunity) to lower level employees of the executive branch, see *Poss v. Lieberman*, 299 F.2d 358 (2d Cir.), cert. denied, 370 U.S. 944 (1962); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir.), cert. denied, 374 U.S. 827 (1963), so it follows that qualified immunity should also be applicable to lower level federal officials. Moreover, the Ninth Circuit recently held that IRS agents enjoy a qualified immunity for actions taken in the course of their official duties. *Mark v. Groff, et al.*, 521 F.2d 1376 (9th Cir. 1975). Thus appellees Land, Reilly and Levine clearly are each entitled to a qualified official immunity.

The Supreme Court's recent decisions discussing "qualified" immunity of executive officials have not attempted to define the parameters of this immunity beyond asserting that such immunity exists wherever there is a "good faith" belief in the lawfulness of the conduct, which is supported by "reasonable grounds for the belief formed at the time and in light of all the circumstances". *Scheuer v. Rhodes*, supra, 416 U.S. at 232, 247-248. The requisite showing of good faith can be made by affidavit; moreover, summary judgment dismissing a complaint is appropriate where the undisputed facts establish that the defendants acted in good faith and had reasonable grounds for their conduct. *Scheuer v. Rhodes*, supra at

¹⁷ In ruling that certain officials in the Department of Agriculture and Commodity Exchange Authority were sufficiently protected against damage suits by the qualified "good faith" immunity announced in *Scheuer* and *Wood*, this Court rejected the officials' claim that they too were entitled to the "absolute immunity clearly available at common law to judges, prosecutors, and legislators." 535 F.2d at 695-6.

250. Further, this Court in *Economou, supra*, expressly sanctioned the use of affidavits and summary judgment in cases such as this, rather than require the defendants "to face an expensive, protracted and wasteful trial." 535 F.2d at 833.

In the case at bar, the facts and circumstances surrounding appellees' performance are laid out in the certified transcript of the tax refund trial (A. 1 *set seq.*), and are amplified by the post-trial motion and appellate proceedings. The affidavits submitted by Land, Reilly, and Levine answering the Cataldos' complaint establish that each acted at all times in accordance with his official duties and with a good faith belief in the lawfulness of his activities. The record, in turn, shows beyond any doubt that reasonable grounds for this belief existed at the time and in light of all the circumstances. Indeed, the record shows that these government officials attempted in good faith to do their jobs in the context of a trial made difficult by the conduct of appellant Anthony Cataldo himself.¹⁸

C. Common law immunity

It should be noted that Land, Reilly, and Levine are also cloaked with the same common law immunity from damage suits available to the United States. Government officials are immune from civil damage actions provided (a) their actions would not give rise to a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* and (b) they are being sued for actions taken within the course of their official duties. *Broome v. Simon*, 255 F. Supp. 434, 440 (W.D. La. 1965); *Benjamin v. Ribicoff*, 205 F. Supp. 532 (D.C. Mass.

¹⁸ As a result of his conduct during the trial, Cataldo was held in contempt by Judge Levet and fined \$50 (A. 88). The contempt was upheld on appeal. *Cataldo et al. v. United States*, C.A. 2, No. 74-2537.

1962). See also *Blitz v. Boog*, 328 F.2d 596 (2d Cir.), cert. denied, 379 U.S. 855 (1964).

Although the Federal Tort Claims Act provides that the federal government shall be liable in tort to the same extent as a private person, it specifically excludes therefrom (in 28 U.S.C. § 2680) numerous types of claims, including:

- (a) Any claim arising out of the assessment or collection of any tax or custom duty . . .
- (b) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights . . .

Since the instant action arises out of an unsuccessful challenge to a tax assessment, it falls within the exclusion of subsection (a). Moreover, since the Cataldos' complaint alleges misrepresentation and deceit, it also falls within the exclusion of subsection (b). Thus appellees' conduct would not give rise to a suit against the United States under the Federal Tort Claims Act.

Mr. and Mrs. Cataldo also urge that they have stated a claim under Section 487¹⁹ of the New York Judiciary law and pray for summary judgment on that basis. There are two preliminary barriers to this claim. First, regardless of how the Cataldos characterize this action, it is still a collateral attack on the adverse decision in the tax refund suit—a transparent attempt to collect from Land and Reilly²⁰ the same refund they were unsuccessful in collecting from the United States. Secondly, both the

¹⁹ For the text of Section 487, see note 8 *supra*.

²⁰ Section 487 is applicable only to attorneys. *Nones v. Security Title & Guaranty Co.*, 4 Misc. 2d 1057, 162 N.Y.S. 2d 761 (Sup.Ct. 1956) (discussing Section 487's predecessor, Section 273 of the Penal Law). Hence under no circumstances would it apply to Agent Levine.

district court and this Court made the independent determination in the tax refund action, on the same record now again before this Court, that there was no merit to the allegations of wrongdoing proffered by Mr. and Mrs. Cataldo.

However, even setting aside these formidable obstacles, Section 487 is inapplicable to the Cataldos' claims against Land and Reilly because it is a state statute which pertains only to state courts and does not apply to federal attorneys who are alleged to have engaged in wrongdoing in the course of defending the United States in a federal cause of action in a federal court.

First, Section 487 does not encompass wrongdoing committed in a federal court since it is a penal provision,²¹ and it is firmly established that state penal laws governing substantive conduct are applicable to federal facilities only to the extent that Congress has provided. U.S. Const., Art. IV, Sec. 3; *United States v. Sharpnack*, 355 U.S. 286 (1958). While Congress has provided in the Assimilated Crimes Act, 18 U.S.C. § 13, that state penal provisions shall pertain to acts committed on federal property if the conduct proscribed by state law has not already been made punishable by Act of Congress, Congress has in fact enacted laws establishing sanctions for fraud, deceit and misrepresentation on the federal courts, 18 U.S.C. § 1001, see *United States v. Stephens*, 315 F. Supp. 1008 (D. Okla. 1970), and for subornation of perjury, 18 U.S.C. § 1622. Thus, since the wrongdoing complained of has been made punishable by an Act of Congress, the sanctions contained

²¹ The treble damage claim, although technically civil, is penal in nature. This Court has characterized the federal False Claims Act, which provides civil liability for double damages, as "not only penal, but drastically penal." *United States v. Bausch & Lomb Optical Co.*, 131 F.2d 545 (2d Cir.), *aff'd*, 320 U.S. 711 (1942). It no doubt would say the same of the treble damage provision of Section 487.

in Section 487 of the New York State Judiciary Law are clearly inapplicable to appellants' claim.²²

Second, as a statute in derogation of the common law, Section 487 should be narrowly construed. In this regard Section 487 and its predecessors (Section 273 of the Penal Law which in turn was preceded by Section 148 of the Penal Law) were clearly intended by the legislature of the State of New York to regulate conduct of attorneys as that conduct relates to the courts of New York. The one reported decision which discusses the policy behind the earliest predecessor to Section 487, Section 187 of the former Penal Law, confirms that this provision was passed in order to give state courts a means of punishing wrongdoing committed through them. *People v. Oishei*, 20 Misc.

²² The fact that Congress has prescribed a lesser or different punishment for the proscribed conduct does not invoke the state created sanctions. If Congress has acted to make specified conduct punishable, the state created sanctions do not apply. *Hockenberry v. United States*, 422 F.2d 171 (9th Cir. 1970). Moreover, Congress has in fact acted in other respects to punish or otherwise provide redress for the conduct challenged by Cataldo and his wife. First, the federal courts have disciplinary power over attorneys for fraud, deceit, conduct prejudicial to the administration of justice and other conduct unbecoming a member of the bar. E.D.N.Y. General Rule §5(f); Federal Rule of Appellate Procedure 46(c). Second, the Federal Rules of Civil Procedure provide a remedy for correcting judgments arising from proceedings which were tainted by fraud and deceit of the kind appellants allege. Under Rule 60(b) of the Federal Rules of Civil Procedure a party may be relieved from a final judgment, order or proceeding because of, *inter alia*, "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." In sum, Congress has spoken with respect to the punishment and remedy for fraud, deceit and other misconduct committed in the course of proceedings in federal courts and has provided an adequate remedy for correcting a judgment resulting therefrom. Nowhere has Congress evinced any intent whatsoever to adopt the sanctions set forth in Section 487 of the New York Judiciary Law for similar acts of misconduct in state courts.

163, 45 N.Y.S. 49, 52 (Sup. Ct. 1897). The treble damage provision was added to curb venality by the private bar. Since government attorneys do not stand to gain financially from their alleged wrongdoing (and the Cataldos do not make such an allegation here), that provision can hardly have been intended to be applicable to them.

Finally, and perhaps most significantly, it is clear that the State of New York had neither the power nor the intent to regulate the conduct of attorneys in federal courts, the control of which rests entirely within the province of a separate sovereign. See *Theard v. United States*, 354 U.S. 278 (1957).

D. Perjury, subornation of perjury and conspiracy to commit perjury do not give rise to a cause of action for damages

The claims based on alleged perjury, subornation of perjury and conspiracy to commit perjury must be dismissed for failure to state a claim upon which relief can be granted. It is not necessary to determine whether federal or state law applies to these charges since the result is the same in any event.²³ Federal courts applying

²³ Federal law presumably should apply since there is an overwhelming federal interest (the alleged wrongdoing involved the actions of federal officials during a trial in federal court of a federal tax claim against the United States) and there is a need for uniform application of the law among federal courts. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). However, it is not inappropriate for this Court to look to the law of New York for guidance. In the absence of preemption, an applicable federal statute or dispositive case law, state law furnishes an appropriate and convenient measure of the content of federal law. *Board of County Commissioners v. United States*, 308 U.S. 343, 352 (1939). The common law principles involved here have been most fully developed in state court decisions.

federal law adhere to the common law rule that a private right of action for damages resulting from perjury, conspiracy to commit perjury, or subornation of perjury may not be maintained by the injured party against the alleged perjurer. *Levy v. Hayward*, 284 F.2d 152 (D.C. Cir.), cert. denied, 356 U.S. 941 (1958); *First v. Gallant*, 240 F. Supp. 827 (W.D.S.C. 1965). New York adheres to the same common law rule. *Young v. Leach*, 27 App. Div. 293, 50 N.Y.S. 670 (1st Dept. 1898); *Morgan v. Morgan*, 129 Misc. 212, 221 N.Y.S. 117 (1st Dept. 1927); *Anchor Wire Corp. v. Borst*, 227 App. Div. 728, 730, 102 N.Y.S. 2d 871, 872 (1st Dept. 1951) ("It is settled law that a plaintiff who has lost his case because of perjured testimony cannot sue the perjurer for damages . . . [T]he principle has become too well established to be questioned . . .". See generally Annot., 54 A.L.R. 2d 1298 (1956). The fact that a claim is based on alleged "fraud and deceit" is irrelevant if in fact the claim is based on perjury or subornation of perjury. *Morgan v. Morgan*, supra.

In addition, a conspiracy to give, or to produce the giving of, false testimony has uniformly been held not to give rise to a cause of action for damages. *Anchor Wire Corp. v. Borst*, supra; *Burbrooke Mfg. Co. v. St. George Textile Corp.*, 283 App. Div. 640, 129 N.Y.S. 2d 588 (1st Dept. 1954); *Silverman v. Doran*, 23 Misc. 96, 51 N.Y.S. 731 (Sup. Ct. 1898); *William v. McClennan*, 59 Misc. 620, 111 N.Y.S. 229 (Sup. Ct. 1908); *Fun Fair Park, Inc. v. Gabor Holding Corp.*, 22 Misc. 2d 829, 203 N.Y.S. 2d 238 (Sup. Ct. 1960). See generally, Annot., 31 A.L.R. 3d 1423 (1970).

An exception to the common law rule that an action will not lie for perjury exists where the perjury was a means to, or a step in the accomplishment of, a larger conspiracy. However, in order to fall within this exception, the perjured testimony must not be the sole

moving factor upon which the cause of action is based, but rather must be part of or incident to a fraud consummated outside the prior proceeding. *Verplank v. Van Buren*, 76 N.Y. 247 (1879). See also *Oldham v. McRoberts*, 37 Misc. 2d 979, 237 N.Y.S. 2d 26 (Sup. Ct.), *aff'd*, 18 App. Div. 2d 733, 235 N.Y.S. 2d 457 (4th Dept. 1962); *Conwell v. Portow*, 18 App. Div. 2d 836, 238 N.Y.S. 2d 90 (2d Dept. 1963). Moreover, the New York Court of Appeals has ruled that this exemption must be narrowly construed. *Ross v. Preston*, 292 N.Y. 433, 55 N.E. 2d 490 (1944).

Clearly, the wrongdoing Mr. and Mrs. Cataldo complain of could have occurred only within the context of their tax refund suit. Even accepting these contentions at face value, they do not allege facts indicating the existence of a conspiracy or fraudulent scheme which goes beyond the judicial proceeding in which the alleged perjury and subornation of perjury supposedly occurred. Therefore, the Cataldos' claims do not fall within the acknowledged exception to the general rule that no action for damages may be maintained for perjury or subornation of perjury.²⁴

E. Alleged failure to respond to a subpoena *duces tecum* does not give rise to a cause of action for damages

There is no support whatsoever for the proposition that the alleged failure of Land, Reilly, and Levine to respond to the Cataldos' subpoena *duces tecum* gives rise to a private right of action for damages. Setting aside the fact that the trial court found that these officials acted properly

²⁴ At least one other federal court has held the exception to be inapplicable in a case similar to that at bar. *Levy v. Hayward*, 248 F.2d 152 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 941 (1958).

in refusing to honor the subpoena in all its respects, it cannot reasonably be disputed that the Cataldos' proper remedy in the event of non-compliance was to petition the court for an order compelling appellees' response. In addition, Rule 45(f) of the Federal Rules of Civil Procedure provides that, "Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued." Moreover, a court may, in lieu of contempt, utilize the sanctions outlined in Rule 37 of the Federal Rules of Civil Procedure. See 5A J. Moore, *Federal Practice* § 45.03 (2d ed. 1977).

There are no reported cases which even intimate that a cause of action for *damages* might lie for failure to honor a subpoena *duces tecum*. The few cases which discuss the issue of sanctions note that the appropriate remedy is a contempt proceeding, *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977) or the imposition of fines equal to costs incurred, *In re D.I. Operating Co.*, 240 F. Supp. 672 (D. Nev. 1965). New York law is entirely in accord with these principles. *Manning v. Valente*, 272 App. Div. 358, 72 N.Y.S. 2d 88 (1st Dept.), *aff'd*, 297 N.Y. 681, 77 N.E. 2d 3 (1947).

In sum, the Cataldos' cause of action for damages based on alleged non-compliance with their subpoena *duces tecum* has no more basis in law than it does in fact.

CONCLUSION

The order of the district court dismissing appellants' complaint should be affirmed.

Respectfully submitted,

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* We wish to acknowledge the assistance, in the preparation of this brief, of Charles A. Damato, a student at New York Law School.

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LEE ADLERSTEIN

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 5th day of December 1977 he served a copy of the within
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:
ANTHONY B. CATALDO, ESQ., 111 BROADWAY, NEW YORK, NEW YORK 10006

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County
of Kings, City of New York.

Sworn to before me this

5th day of December 1977

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4616824
Qualified in Kings County
Commission Expires March 30, 1979

